CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 145.

THE OWENSBORO WATER WORKS COMPANY OF OWENSBORO, KENTUCKY, APPELLANT,

vs.

THE CITY OF OWENSBORO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

FILED DECEMBER 31, 1904.

(19,576.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 24, 1905.

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1 Transcript of Record.

Circuit Court of the United States for the Sixth Circuit, Western District of Kentucky, Owensboro Division, at Owensboro, Kentucky.

THE OWENSBORO WATER WORKS COMPANY OF OWENSBORO, KENTUCKY,
v.
THE CITY OF OWENSBORO, KENTUCKY.

Pleas before the Honorable Walter Evans, judge of the district court of the United States for the western district of Kentucky, sitting as circuit judge, at a regular term of the circuit court of the United States, sixth circuit and western district of Kentucky, Owensboro division, begun and held on the twenty-eighth (28th) day of November, A. D. 1904, at Owensboro, Kentucky.

Be it remembered that heretofore, to-wit: on the 26th day of May A. D. 1904 there was filed in the clerk's office of said circuit court of the United States at Owensboro, Kentucky, a bill in equity and five exhibits, copies of which are as follows, to-wit:—

2 Circuit Court of the United States for the Sixth Circuit, Western District of Kentucky, Owensboro Division, at Owensboro, Kentucky.

THE OWENSBORO WATER WORKS COMPANY OF Owensboro, Kentucky (a Corporation), Complainant,
versus
THE CITY OF OWENSBORO, a Municipal Corporation, Defendant.
} Bill in Equity.

Your orator, the complainant, The Owensboro Water Works Company, of Owensboro, Kentucky, most respectfully states that it is a citizen of said city, and of the western district of Kentucky, Owensboro division, and having its chief office in said city and district in said State, and is a domestic corporation, created, organized, existing and doing business by and under the laws of the State of Kentucky, and by and under its articles of incorporation, which were duly executed in pursuance of chapter fifty-six (56) of the General Statutes of Kentucky, and recorded in the office of the clerk of the Daviess county court, in the State of Kentucky, which is the county in which said orator's place of business is situated. It was so created a corporation and organized and began business on the 3d day

of June, 1889, and by the terms of its articles of incorporation its corporate existence was and is a period of twenty-five years from and after said date.

Among the powers conferred upon and vested in it by its said articles of incorporation, and by and under the laws of the State of Kentucky, is the power to contract and be contracted with, and to sue and to be sued, in its corporate name. It files herewith
3 and makes the same a part hereof a certified copy of its said articles of incorporation, marked Exhibit "A."

Your orator further respectfully shows that the defendant, The City of Owensboro, Kentucky, is a municipal corporation created, organized and existing by and under the laws of the State of Kentucky, located in the county of Daviess in said district and State. The defendant was originally created a city by an act of the General Assembly of the Commonwealth of Kentucky, entitled "An act to incorporate the city of Owensboro in Daviess county," which act was approved and became a law on February 16, 1866.

The charter of the defendant city, of 1866, was, from time to time, altered and amended until finally, an act was passed by the General Assembly of the Commonwealth of Kentucky, emtitled "An act for the government of cities of the third class," which act was approved and became a law June 14, 1893, (contained in Kentucky Statutes, section 2740, and sections 3236 to 3840) by which the city of Owensboro was declared to be of the third class of cities of this Commonwealth, and so was, and still is, regulated, and exists by virtue of the act aforesaid. By the said act it was authorized to contract and be contracted with, to sue and to be sued, and to exercise all of the other powers of a municipal corporation of said class.

Your orator respectfully says it owns a large amount of real estate, largely exceeding $2,000 in value, and also a large amount of personal property, in said city, subject to taxation, and is, and was, on all the dates named herein, a tax payer therein, and at all the times hereinafter mentioned, its said real estate, as well as its personal property, was assessed for taxation, by said city, and annually paid its taxes, amounting to several thousand dollars per year, and it further says that it, and all other owners of real
4 estate and tax payers, in said city, are interested in and affected by the matters hereinafter set up, and it sues on behalf of itself and of such other owners of real estate and tax payers in said city, and says that said owners of real estate, assessed for taxation, and tax payers number several thousand persons, and that the matters herein alleged are of common and general interest to all of said tax payers, but that it is impracticable, because they are so numerous, to bring them before the court in a reasonable time.

Your orator further says that on the 10th day of October, 1900, the common council of the city of Owensboro, passed, and adopted, and the mayor approved, a certain ordinance entitled "An ordinance providing for obtaining the assent of the voters of the city of Owensboro, to authorize the common council thereof to borrow money by

issuing the bonds of said city for the purpose of erecting a system of water works for supplying the city of Owensboro and the inhabitants thereof with water." The said ordinance provided for a special election to be held in the city of Owensboro, at the several voting places therein, on the first Tuesday after the first Monday in November, 1900, to ascertain whether or not two-thirds of the voters of said city, voting at said election, would assent to the proposition, "Do you assent to the proposition that the city of Owensboro shall issue $200,000.00 of its bonds, for the purpose of borrowing money to be used for the erection of a system of water works for supplying the city of Owensboro and the inhabitants of said city with water?"

The said ordinance also made provision for the submission of said proposition to the voters of said city, and directed how the bonds, if authorized, should be executed and disposed of. A duly certified copy of said ordinance is filed herewith and made part hereof, marked Exhibit "B."

Your orator further says that, on the first Tuesday after the first Monday in November, 1900, at a general election in said city, and in pursuance of the ordinance aforesaid, the proposition was submitted to the voters of said city, as to whether said city should be authorized to issue on behalf of said city, $200,000.00 in bonds for the purpose aforesaid, and at said election said proposition was voted upon and it was certified, by the proper officers, that two-thirds of the voters, of said city, voting on said question, had voted in favor of the proposition, authorizing the city to issue the bonds of said city, in the amount aforesaid, to-wit: $200,000 to be sold, and the proceeds used for constructing water works, as aforesaid.

Your orator further shows that afterwards on the 3d of December, 1900, the common council of defendant city, enacted, and the mayor of said city approved, a certain other ordinance entitled, "An ordinance authorizing and directing the issue and sale of the bonds of the city of Owensboro, and appropriating $14,666.66 out of the revenues and public moneys of the city for the payment of the semi-annual interest thereon and the creation of a fund for the ultimate payment of the principal thereof." In the said ordinance it is recited, and the mayor and common council determined that the vote, taken under the ordinance of October 10, 1900, was in favor of the issue of said bonds, and that the said mayor and common council were empowered and authorized to issue said bonds, and that said bonds should be issued, pursuant to said original ordinance and the ordinance of December 3, 1900, and it was provided and determined, by said common council, in said ordinance, that it was then
6 advisable for the common council to issue said bonds, to the amount of $200,000 for the purpose of erecting, building, and acquiring a water works plant and system for the purpose of supplying the city of Owensboro, and the inhabitants thereof, with a sufficient amount of wholesome water for all public and private uses. And it was also further ordained that said bonds be then issued as soon as practicable after the 1st of January, 1901, and be

sold and delivered for the best price possible, not to be less than par, and that the proceeds should be paid into the city treasury to the credit of a fund to be designated "Owensboro water bond account." And it was also provided therein that the principal and interest of said bonds should be made payable to the National Deposit Bank of Owensboro, Kentucky, said bank being a national bank duly organized under the laws of the United States. A duly certified copy of said ordinance is filed herewith and made a part hereof, marked "C."

Your orator further says that the third section of the ordinance aforesaid, of December 3, 1900, was amended by the mayor and council of said city by the enactment, adoption, and approval of an ordinance of March 11, 1901, entitled "An ordinance amending the third section of an ordinance entitled 'An ordinance authorizing and directing the issue and sale of the bonds of the city of Owensboro, and appropriating $14,666.66 out of the revenues and public moneys of the city, for the payment of the semi-annual interest thereof, and the creation of a fund for the ultimate payment of the principal thereof," finally passed and approved on the 3d day of December, 1900. By said third section of the ordinance, so amended, $14,666.66 was appropriated and set apart out of the revenues and funds of the said city to be raised by taxation, or otherwise, each year, until said bonds were paid for the purpose of paying the
7 interest on said bonds semi-annually and for creating a sinking fund for the payment of the principal thereof, and for the purpose of providing a fund for said purpose, it was ordained that there should be, and that there was thereby levied, upon all the taxable property of said city, subject, by law, to taxation, for municipal purposes, a direct annual tax for the year 1901, and for each succeeding year up to, and including the year 1931, sufficient to raise the said sum of fourteen thousand, six hundred and sixty-six dollars and sixty-six cents, to be annually collected with other municipal taxes, licenses, revenues and public dues, and continuing from year to year until the ultimate payment of said bonds, and it was also, by said ordinance, ordained that no part of said funds should ever be used for, or appropriated to, any other purpose or use, except the payment of the principal and interest of said bonds, and it was furthermore ordained that provision to meet the requirements of said section should be made in the annual budget and appropriation ordinance. A duly certified copy of said amended ordinance is filed herewith, and made part hereof, marked "D."

Your orator further says that, in pursuance of said ordinance of December 3, 1900, the said mayor prepared and executed 200 bonds of $1,000 each, bearing 4% interest per annum, from the date, to-wit: from January 1, 1901, for thirty years thereafter, the interest on each of said bonds being evidenced by 60 coupons for $20 each, the first two being payable the first day of January, 1901, and the first day of July 1901, and the remainder semi-annually, on said day, until the maturity of said bonds, and said bonds and coupons

were made payable to bearer at the National Deposit Bank
8 of Owensboro, Kentucky, a national bank as before stated, which bonds were transferable by delivery, and they are now in the possession of the said city, or its officers, or agents, but under its control, ready and about to be immediately sold and delivered to purchasers, with the exception of seven bonds, which the said mayor and council have already sold, and have received therefor the sum of $7,000. Complainant files, herewith, as part hereof, marked Exhibit "E," a true copy of said bonds, and coupons attached, excepting dates, numbers and signatures.

Your orator further says that on May 6, 1901, the common council of said city, at a regular meeting, duly enacted an ordinance, levying an ad valorum tax of $2.00 on each $100 worth of property, in said city, subject to taxation, to be collected by the collector of said city, chosen for that year, and of said tax so to be collected, part thereof was appropriated as follows, to-wit: "For payment of annual interest on said water bonds, $200,000 and creation of sinking fund, for their ultimate payment $14,666.66." The said water bonds, so referred to, were the 200 bonds of $1,000 each, already described herein. The complainant further says that said sum was duly collected in the fiscal year 1901–'2 by the collector of said city, and paid into its treasury, on the account aforesaid.

Your orator further shows that, on May 5, 1902, the common council of the city of Owensboro, levied a tax of $2.00 ad valorum on each $100 worth of property, subject to taxation in said city, and of said sum, so levied, there was appropriated $14,666.66 to pay interest accruing annually on the bonds aforesaid, and to create a sinking fund to be used in the payment of the principal of said bonds, the language of said ordinance making said appropriation in
9 part, is as follows: "For payment of interest on said water bonds, $200,000.00 and creation of sinking fund for payment of same, $14,666.66." Your orator says that the said tax, so assessed, as aforesaid, was duly collected from it and the other tax payers, of said city, and paid into its treasury, to-wit, $14,666.66, which was paid on account of the interest, and sinking fund aforesaid.

Your orator further says that on the — day of May, 1903, the common council of said city levied an ad valorum tax of $2 on each $100 worth of property, in said city, subject to taxation, and of said sum, so levied, said council appropriated $14,666.66, being $8,000.00 for the payment of interest on the bonds aforesaid, and $6,666.66 to create a sinking fund for the ultimate payment of the principal of said bonds. And the sum levied as aforesaid, was collected of the tax payers of said city, and duly paid into its treasury, to wit, $14,666.66 for, and on account of the interest, and the sinking fund, aforesaid.

Your orator further shows that by an ordinance of said city duly enacted by the common council thereof and approved by its mayor on the 16th of May, 1904, the defendant levied an ad valorum tax on each $100 worth of the taxable property in said city, including

the property owned in said city by your orator subject to taxation, to be collected by the collector of said city for the year 1904, and of said taxes so levied, and ordered to be collected, a part thereof was appropriated, by said ordinance, to-wit: the sum of $14,666.66 for the payment of annual interest on said water bonds, of $200,000 and the creation of a sinking fund for their ultimate payment. Your orator further says that, of the said $14,666.66 the sum of $8,000 has been appropriated by said city to be paid on the
10 interest of said bonds to accrue during the year 1904, and the sum of $6,666.66 thereof was set apart for a sinking fund for the ultimate redemption of said bonds. Your complainant says that said sum is being collected and paid into the treasury of said city, and as much as $8,000 thereof is to be collected to pay interest on the $200,000 bonds aforesaid, and as much as $6,666.66 is to be collected as the annual installment to be placed into the redemption fund for the ultimate payment of said bonds. The said $200,000 of bonds aforesaid represent, exclusive of interest, the entire debt authorized to be incurred under said ordinance, and under the vote aforesaid. Now your orator states that said debt has been paid off and fully satisfied by the taxes already collected for said purpose, to the extent of $44,000 leaving only $156,000 of indebtedness, for the payment of interest on which, and for the ultimate payment of which, the defendant has, or at the passage of said ordinance had, any power or authority to further levy or collect taxes off of your orator or of those for whom it sues. Your orator further states that unless the defendant be therefrom restrained by this honorable court, it will proceed to receive, and without right or authority coerce from, and collect of this complainant and the other tax-payers of said city the sums of money aforesaid in excess of the amount which it is authorized to levy and collect, and thereby duly deprive this complainant and the other tax payers aforesaid of their property without due process of law.

Your orator further says the remaining 193 of said bonds, of date January 1, 1901, have never been sold, and are now in the hands of said city, its officers, and agents, and under its control. It
11 further says that the total sum collected by said city, on account of said interest and sinking fund, aforesaid, now amounts to the sum of $44,000.00 which should have been, and should be, appropriated in extinguishment of that much of said debt and bonds, and, also, that the said sum of $14,666.66 be collected, upon the said levy, made on the 16th day of May, 1904, should be likewise applied to the extinguishment of that amount of said debt and bonds.

Your orator further says that the sums aforesaid, so levied by the common council of said city, in the years 1901, 1902, and 1903, and paid by the tax payers to said city, for the interest alleged to be accruing on said bonds, and of the sums aforesaid to create a sinking fund to pay the principal thereon, were not, or any part thereof, used for paying such interest, or creating such sinking fund, and

was not necessary heretofore, or now, to be so used, because said bonds have not been sold, and have not become the obligations of said city, but said sums so collected, became part of the fund in the hands of said city, to be used in building said water plant and water works, thus leaving said city to raise the balance of the $200,000 so voted by the voters of said city, for said purpose, to-wit, the sum of not exceeding $149,000.00 to be raised by the sale of the bonds, aforesaid. But the said city by its officers and agents, claim authority, and are proposing to immediately sell and dispose of, and will so immediately sell and dispose of, unless restrained, the entire amount of said bonds it has in its hands, to-wit, 193 bonds of $1,000 each amounting to $193,000.00.

12 Your orator says that if this shall be done then the said city will have collected and realized at least $244,000.00 in money for and on account of the erection of said water plant and water works, where, the voters of said city, by their vote, aforesaid, and said ordinances, only authorized $200,000.00 to be used by said city for said purpose, and any appropriation of a larger sum is and would be illegal and unauthorized.

It says that said city has no right, power, or authority to appropriate any part of the sum so collected, as aforesaid, to payment of the interest on said bonds, while the latter remained in its hands, and unsold, and it alleges that said city has not done so, but that all of said coupons heretofore maturing, have been detached from said bonds, and have been canselled and destroyed by order of defendant, acting through its common council. All of said money, collected for each of said years, as aforesaid, has been expended by the common council of said city, for other purposes than paying either the principal or interest thereof. Your orator believes and charges that, out of said $44,000.00 collected, the defendant has heretofore expended the sum of $200,000.00 in the purchase of land in said city, upon which said water plant is to be erected, and in sinking wells for the purpose of furnishing water for said system, and in having plans and specifications made for said plant, and $24,000.00 (of said $44,000.00) has been wrongfully and illegally expended, by said city, for other purposes than that for which the same was levied and collected. To the extent that said sum was expended, for any purpose other than the extinguishment of said debt and bonds and interest, or in the erection of said water works plant, said expenditures *was* illegal and without authority, for your orator now respectfully shows that until said bonds shall be sold, and

13 shall become interest bearing obligations of said city, all taxes collected on account thereof, whether levied and collected for either interest or sinking fund, should be applied wholly to the payment, *pro tanto*, of the debt of $200,000.00 authorized by said ordinance and vote, and to no other purpose, for its says, that by section 180 of the present constitution of the State of Kentucky adopted September 28, 1891, it was provided as follows, to-wit: "Every act enacted by the General Assembly and every ordinance

and resolution passed by any county, city, town, or municipal board or local legislative body, levying a tax, shall specify distinctly the purpose for which said tax is levied, and no tax levied and collected for one purpose shall ever be devoted to another purpose.

Your orator says at the time the levies of taxes above recited were made, it was stated in the ordinance making same, that the purpose of said levy was to pay the annual interest on said bonds, for each of said named years, and to provide a sinking fund for their final redemption—and so the use of said sums for other purposes was wrongful, and in violation of said constitutional prohibition.

For each of said years, to-wit: 1901, 1902 and 1903, taxes were levied on the taxable property of complainant, and all other tax payers of said city, and also capitation, license and franchise taxes were assessed and levied, and same were collected by it, and all the taxes so levied were collected each year, from all sources, and for all purposes, were expended and exhausted each year, and none of the taxes so collected, in either of said years, are now on hand, and no part of said $44,000.00 collected is on hand, nor has said city any means of replacing same, except by levying and collecting
14 taxes from the tax payers of said city for that purpose, and this it has no legal authority to do.

Your orator further says that by the payment of said $44,000.00 it paid and extinguished that amount of said bonds, and said bonds to that amount should be surrendered by said city and cancelled, and that by law, complainant, and other tax payers, have the right to have said bonds so surrendered and cancelled.

Your orator says said bonds are negotiable by delivery and are on the footing of commercial obligations, and, if said 193 bonds, or any of them, shall be sold and transferred, for value, to innocent *bona fide* purchasers then complainant and all other tax payers of said city would be compelled to pay the full amount of all of said two hundred bonds, and the full amount of all interest accrued, or to accrue thereon. It says defendant and its officers and agents purpose, and are now endeavoring to immediately sell and transfer said 193 bonds, and coupons attached, to some person for value, and are doing this without giving such persons any notice, or information of the facts herein stated, or of any facts pertaining to the collection or disposition of any part of said $44,000.00 and purpose to continue said efforts without giving to any person, to whom said bonds may be offered, any notice or information pertaining thereto, and said prospective purchasers have no notice, knowledge, or information of any of said facts, so far as complainant is advised or believes, and, unless restrained and prevented, defendants and its officers and agents will immediately sell said bonds and coupons to some person or persons, for value, who have no notice or information in regard to said transaction, and will do so without giving such persons any notice or information as to said facts and
15 thus complainant and its property, and said other tax payers and their property, will be burthened with the payment of

said entire 200 bonds and interest, and, by the means aforesaid, and without due process of law, deprived of the right to have credit, on said debt, for said $44,000.00 heretofore paid by them, and be compelled to pay said 200 bonds and all interest accrued and to accrue thereon.

Your orator says that by article fourteen of the amendments to the Constitution of the United States, it is provided that no State shall "deprive any person of life, liberty or property, without due process of law," but your orator says that if more than one hundred and forty-nine of said bonds shall be sold to innocent purchasers, without notice, which defendant city is about to do, that it and the tax payers, for whom it sues, will be forced to pay such excess—both principal and interest—without opportunity to plead, or to be heard as to the matters herein alleged, and so deprived of their property without due process of law, and the amount in controversy here exceeds two thousand dollars.

Your orator further respectfully shows that if the relief sought herein, is not granted to your orator and those for whom it sues, the defendant will proceed to sell all of the said bonds remaining in its hands, to-wit, 193 bonds, and thus deprive complainant, and its fellow tax payers of relief against the wrongful burdens herein threatened, by the defendant, and to result from its sale of said bonds, and it and all the other tax payers of defendant city will be denied the equal protection of the laws. It alleges that no previous injunction has been asked for, granted or refused by this, or any other court, or by any judge or clerk.

16 To the end, therefore, that your orator may have that relief, which it can only obtain in a court of equity, and that the said defendant may answer the premises, but not under oath or affirmation, the benefit whereof is expressly waived by your orator, it now prays the court that defendant, its officers and agents, be perpetually enjoined and restrained from selling or disposing of any of said bonds in excess of one hundred and forty-nine (149) in number, and, before selling same to detach and destroy all coupons, for interest, that have heretofore matured, or that may mature before the date when said bonds may be sold, and be ordered and compelled to cancel, and surrender all of said bonds, and all coupons pertaining thereto, in excess of one hundred and forty-nine (149) in number, and that said bonds and coupons be destroyed, and, if said sum of $14,666.66 levied May 16, 1904, shall be collected before the sale shall be made of said bonds, that said sum be applied to the extinguishment of said debt and interest, and said bonds, and interest coupons be destroyed, and not sold, as prayed for in regard to the money heretofore collected.

Your orator further prays the court that defendant be enjoined and restrained from levying and collecting of complainant, and all the other tax payers, of said city, or their property, any taxes in excess of a sufficient amount to create a sinking fund with which to pay said 149 bonds, when sold, and said 7 bonds, already sold, and

to pay the interest to accrue thereon, upon said 7 bonds, heretofore sold, and to accrue upon said 149 bonds, after they may be sold.

Your orator further prays that the said sum of $44,000.00 paid by the tax payers of said city, as hereinbefore set out, be adjudged to have satisfied that amount of said bonds, and that your orator
17 may have such further, or other, relief in the premises as the nature of the circumstances of the case may require.

And may it please your honors to grant unto your orator a writ of subpœna, issuing out of and under the seal of this honorable court, to be directed to the said city of Owensboro, commanding it, on a certain day and under certaiⱥ penalty in the writ to be inserted, personally to be and appear before your honors in this honorable court, and then and there full, true and perfect answer make, to all and singular the premises, and further, to stand, to perform, and abide such further orders, direction and decree therein, as to your honors shall seem meet and shall be agreeable to equity and good conscience.

And your orator will ever pray.

W. W. ELLIS,
J. D. ATCHISON,
LITTLE & SLACK,
Solicitors for Complainant.

STATE OF KENTUCKY, }
County of Daviess, } *sct:*

James J. Sweeney being duly sworn according to law deposes and says: I am president of the complainant, Owensboro Water Works Company, in the foregoing bill, and have read said bill and the same is true to my own knowledge, except such matters as are therein stated on information and belief, and as — such statements, I believe them to be true.

JAMES J. SWEENEY.

Subscribed and sworn to before me by James J. Sweeney this 26th day of May, 1904.

DUDLEY LINDSEY, U. S. Com'r.

18 Articles of Incorporation.

The undersigned, Samuel A. Miller, Americus F. Callahan and William Reinecke, all of Louisville, Kentucky, as corporators, have associated themselves, their associates and assigns, together to become and be incorporated as a corporation for transacting the business of a water works company under the provisions of chapter 56 of the General Statutes of Kentucky, and its amendments; and they have adopted these articles of incorporation.

1. The names of the corporators of the said incorporation are the following: Samuel A. Miller of Louisville, Kentucky; Americus

F. Callahan of Louisville, Kentucky, and William Reinecke, of Louisville, Kentucky.

2. The name of said corporation is: The Owensboro Water Works Company, of Owensboro, Kentucky.

3. The principal place of transacting the business of the said corporation is the city of Owensboro, in the county of Daviess, in the State of Kentucky.

4. The general nature of the business proposed to be transacted by the said corporation is to acquire the water works of the Owensboro Water Company, a corporation organized and existing under the laws of the State of Kentucky, and its contracts for supplying the city of Owensboro and its inhabitants with water, and to maintain and operate water works in the city of Owensboro, in the county of Daviess, in the State of Kentucky, for suppling the said city of Owensboro and the inhabitants of the said city and its vacinity with water for public and private purposes.

5. The authorized amount of capital stock of the said corporation is (subject to the power of increase hereinafter mentioned) the sum of three hundred thousand dollars, divided into three thousand shares of one hundred dollars each. Five thousand dollars thereof are to be paid in *in* cash, immediately upon the organization of the said corporation, and two hundred and ninety five thousand
19 dollars are to be issued in fully paid certificates as a part of the consideration to be paid to the said Owensboro Water Company for the purchase of its water works and contracts. The board of directors may increase the amount of the capital stock from time to time to a total amount not exceeding five hundred thousand dollars.

6. The time of the commencement of the said corporation is the first day of June in the year one thousand eight hundred and eighty nine, and it shall terminate twenty five years thereafter, subject to such extensions of its term of existence as by law provided.

7. The affairs of the said corporation shall be conducted by a board of directors of five stockholders, and by the following officers: A president; vice president; a secretary and a treasurer. The board of directors for the first year shall consist of Samuel A. Miller, John Long, Americus F. Callahan, William Reinecke, and Henry P. Martin. Annual elections of the board of directors shall take place at the annual meetings of the said corporation on the first Saturday in June of each and every year beginning with the year 1890. The officers shall be elected by each board of directors as soon as convenient after the election of the respective board for the term of the said board.

8. The highest amount of indebtedness or liability direct or contingent, to which the said corporation is at any time to subject itself, or to be subject, shall not exceed two thirds of its capital stock.

9. Among the powers of the said corporation shall be the following: To have perpetual succession; to sue and be sued by the corporate name; to have a common seal and to alter the same at pleasure;

to render the shares and interest of the stockholders transferable, and to prescribe the mode of making such transfers; to exempt the private property of the members from liability for corporate debts; to make contracts, acquire and transfer property, possessing the same powers in such respects as private individuals now enjoy; to establish by laws; and make all rules and regulations deemed expedient for the management of the affairs of the said corporation not inconsistent with constitution or laws of this State or of the United States.

10. The private property for the corporators and stockholders is to be exempt from the corporate debts.

Witness the hands of the said corporators, this thirtieth day of May in the year one thousand eight hundred and eighty nine.

SAM'L A. MILLER.
AMERICUS F. CALLAHAN.
WM. REINECKE.

STATE OF KENTUCKY, }
Jefferson County, } *sct:*

I, Geo. H. Webb, clerk of the county court of Jefferson county in the State of Kentucky, do certify that on this day the foregoing articles of incorporation were produced to me in my office and acknowledged and delivered by Sam'l A. Miller, Americus F. Callahan and Wm. Reinecke, parties thereto, to be their act and deed, all of which is hereby certified to the proper office for record.

Witness my hand this 1st day of June, 1889.

GEO. H. WEBB, Clerk,
By W. E. BUCKEL,
Deputy Clerk.

STATE OF KENTUCKY, }
Daviess County, } *sct:*

I, M. S. Mattingly, clerk of the Daviess county court, do hereby certify that the foregoing articles of incorporation of the Owensboro Water Works Company were this day lodged in my office, certified as above and together with the foregoing and this certificate duly admitted to record.

Witness my hand this June 3", 1889.

M. S. MATTINGLY, Clerk,
By R. A. HAGAN, D. C.

A copy.
Attest: J. T. GRIFFITH, Clerk,
By CLOTILLE BAMBERGER, D. C.

"Exhibit A."

21 COMMONWEALTH OF KENTUCKY, City of Owensboro, } *sct:*

OCTOBER 10TH, A. D. 1900.

The common council of the city of Owensboro met in special session:

Present, W. P. Small, mayor, presiding, and common councilmen, namely, Messrs. Breidenbach, Delker, McCarroll, Miller, Millett, Nevitt, Ogden, Slaughter and Steitler.

An ordinance entitled "An ordinance providing for obtaining the assent of the voters of the city of Owensboro to authorize the common council thereof to borrow money by issuing the bonds of said city for the purpose of erecting a system of water work- for supplying the city of Owensboro and the inhabitants thereof with water" was publicly read before the common council the second time by the city clerk and on motion of Mr. Millett, seconded by Mr. Nevitt, was put upon its second and final passage and the roll of members being called, Messrs. Breidenbach, Delker, McCarroll, Miller, Millett, Nevitt, Ogden, Slaughter and Steitler voted yea, nays none; and thereupon the same was declared passed. Said ordinance is in words and figures as follows:

An ordi-ance providing for obtaining the assent of the voters of the city of Owensboro to authorize the common council thereof to borrow money by issuing the bonds of said city for the purpose of erecting a system of water works for supplying the city of Owensboro and inhabitants thereof with water.

Be it ordained by the common council of the city of Owensboro:

SEC. 1. That a special election is hereby called and shall be held in the city of Owensboro at the several voting places therein on the first Tuesday after the first Monday in November 1900, to ascertain whether or not two-thirds of the voters of said city, voting at said election, on the proposition hereinafter stated, will assent to and authorize the common council of said city to issue two hundred thousand ($200,000) dollars of the bonds of said city for the purpose of borrowing money to be used in the erection of a system of water works for supplying the city of Owensboro and the inhabitants
22 of said city with water. The mayor is directed to notify the county clerk of Daviess county of the passage of this ordinance and the ordering of said election, and to cause said clerk to have prepared for said election proper official ballots in manner and form as provided and required by the laws of the State of Kentucky. On each of said ballots in an appropriate place shall be printed the following questions: Do you assent to the proposition that the city of Owensboro shall issue $200,000 of its bonds for the purpose of borrowing money to be used in the erection of a system of water works for supplying the city of Owensboro and the inhabitants of said city with water?" and two other places shall be left on the

right of same; one for voters favoring such measure, to be designated by the word "Yes," and one for voters opposing said measure, to be designated by the word "No."

SEC. 2. If two-thirds of the voters in said city voting on said proposition at said election shall assent to said proposition, then the common council shall cause to be issued the bonds of said city in the sum of $200,000. Said bonds shall be designated as Owensboro city water works bonds, and shall be payable at the National Deposit Bank of Owensboro, Kentucky, thirty years after date and shall bear date January 1st, 1901, and shall bear interest at the rate of four per centum per annum from the date thereof until paid, said interest to be payable semi-annually; and for the several installments of interest there shall be attached to each bond, proper coupons. Said bonds shall be of the denomination of $1,000 each and said bonds shall be numbered serially from one (1) to two hundred (200) inclusive, and they shall be signed by the mayor of the city and countersigned by the city clerk and have the seal of the city affixed thereto and the interest coupons shall be signed by the city clerk alone. The city shall have the right and the right is hereby reserved, to pay off any number of said bonds that the common council of said city may direct after the period of ten years from the date of the issual thereof, by paying such bond or bonds, with the interest accrued thereon, up to the date of the payment, and no more; and the common council shall have the power to retire and pay off any number of said bonds after the expiration of said ten years annually, up to the expiration of thirty years, the length of time for which said bonds are to be issued, and that they may be better enabled to do this, if at any time the council should desire to pay off and retire any of said bonds after the right accrues to do so, they are unable to ascertain the name of the owner or owners of said bonds, they shall advertise the number and denomination of each bond for at least thirty days in a daily paper, published in the city of Owensboro, having the widest circulation; and if the bonds so advertised are not presented for payment before the expiration of the thirty days, they shall not bear interest after the said thirty days have expired.

SEC. 3. If said bonds shall be authorized and issued as herein provided, the money borrowed from the sale thereof shall be used in the erection of a system of water works with all necessary machinery, pipes, mains, and for the purchase of ground therefor in the city or beyond the boundary of the city.

SEC. 4. The mayor of said city shall cause notice of the election herein ordered to be published in some daily newspaper published in the city of Owensboro for fifteen days prior to the date of said election.

SEC. 5. This ordinance shall take effect and be in force from and after its final passage, and if two-thirds of the voters of said city voting on the proposition herein submitted at said election shall vote in favor of the said question and the issual of said bonds, then the

common council shall carry into effect the provisions of the ordinance.

Approved October 10th, 1900.

W. P. SMALL, Mayor.

Attest:
W. M. O'BRYAN, City Clerk.

A copy attest
N. LONG, City Clerk.

May 26/1904.

[Seal of City.]

"Exhibit B."

24 COMMONWEALTH OF KENTUCKY, City of Owensboro, } *sct:*

DECEMBER 3RD, 1900.

The common council of the city of Owensboro met in regular session:

Present, W. P. Small, mayor, presiding and common councilmen, namely, Messrs. Ames, Breidenbach, Cary, Delker, McCarroll, Millet, Nevit, Ogden, Slaughter, Steitler and Williams. (M. B. I pp. 236)

An ordinance entitled "An ordinance authorizing and directing the issue and sale of the bonds of the city of Owensboro and appropriating $14,666.66 out of the revenues and public monies of the city for the payment of the semiannual interest thereon and the creation of a fund for the ultimate payment of the principal thereof" was publicly read before the common council the second time by the city clerk, and on motion of Mr. Delker, seconded by Mr. Nevitt, was put upon its second and final passage; and the roll of members being called, Messrs. Ames, Breidenbach, Cary, Delker, McCarroll, Millet, Nevit, Ogden, Slaughter, Steitler and Williams voted yea, nays none; and thereupon the same was declared passed. Said ordinance is in words and figures as follows:

An ordinance authorizing and directing the issue and sale of the bonds of the city of Owensboro and appropriating $14,666.66 out of the revenues and public moneys of the city for the payment of the semi-annual interest thereon and the creation of a fund for the ultimate payment of the principal thereof.

Whereas, under and pursuant to the provisions of an ordinance entitled "An ordinance providing for obtaining the assent of the voters of the city of Owensboro to authorize the common council thereof to borrow money by issuing the bonds of said city for the purpose of erecting a system of water works for supplying the city of Owensboro and the inhabitants thereof with water," passed and approved on the 10th day of October, A. D. 1900, an election
25 was duly and regularly held in the city of Owensboro on Tuesday the sixth day of November A. D. 1900 at which more

than two-thirds of the votes cast at said election in said city on the question submitted, to wit: "Do you assent to the proposition that the city of Owensboro shall issue $200,000. of its bonds for the purpose of borrowing money to be used in the erection of a system of water works for supplying the city of Owensboro and the inhabitants of said city with water?" were in favor of said proposition; that is to say, there was cast a total of one thousand, eight hundred and seventy-six votes, of which 1432 were cast in favor of said proposition and 444 were cast against it, and whereas, it now being deemed advisable by the common council to issue said bonds to the amount of $200,000, for the purpose of erecting, building and acquiring a water works plant and system for the purpose of supplying the city of Owensboro and the inhabitants thereof with sufficient amount of wholesome water for all public and private uses; and, whereas, it is necessary to levy and collect an annual tax sufficient to raise the sum of eight thousand dollars per annum for the payment of interest on said bonded debt, and also the further sum of six thousand, six hundred and sixty-six and 66–100 dollars for the creation of a fund for the ultimate payment of said bonds; and whereas, the population of the city of Owensboro on the first day of August A. D. 1901, was more than, and now exceeds fifteen thousand souls, and the total value of all taxable property is approximately $6,000,000. and the indebtedness of said city is $256,000 exclusive of the bonds to be issued under this ordinance and the total indebtedness of said city including the bonds hereby authorized does not exceed any constitutional or statutory limitations on the power to create indebtedness; and whereas this issue of bonds is authorized by more than two-thirds of the qualified voters of said city voting on the question at a regular election duly and legally held for that purpose, on the sixth day of November, A. D. 1900; therefore,

26 Be it ordained by the common council of the city of Owensboro:

SEC. 1. That the bonds of the city of Owensboro to the amount of two hundred thousand dollars, be issued as authorized and provided by the ordinance entitled "An ordinance providing for obtaining the assent of the voters of the city of Owensboro to authorize the common council thereof to borrow money by issuing the bonds of said city for the purpose of erecting a system of water works for supplying the city of Owensboro and the inhabitants thereof with water" passed and approved on the 10th day of October 1900, as soon as practicable after the first day of January A. D. 1901, and sold and delivered for the best price possible, not, however, at less than par, and the proceeds arising from the sale thereof shall be paid into the city treasury and be placed in a separate account to be designated Owensboro water bond account.

SEC. 2. There shall be issued two hundred bonds designated Owensboro water bonds, of the denomination of one thousand dollars each and numbered consecutively from one to two hundred inclusive. Each bond shall be signed by the mayor and countersigned by the city clerk and have the seal of the city attached. The princi-

pal and interest of the said bonds shall be made payable at the National Deposit Bank of Owensboro, and the coupons signed by the city clerk alone. There shall be sixty coupons of twenty dollars each attached to each bond and the interest shall be payable on the first days of January and July each year. Each bond shall contain a stipulation that the same is payable at the pleasure of the city after ten years from the date thereof.

SEC. 3. That the sum of fourteen thousand, six hundred and sixty-six and 66/100 dollars is hereby appropriated and set apart out of the revenues and funds of the city to be raised by taxation and otherwise, each year, until said bonds are paid, for the purpose of paying the interest on said bonds and creating a fund for the pay-
27 ment of the principal thereof; and for the purpose of providing a fund for said purpose, there is hereby levied upon all the taxable property of said city, subject by law to taxation for municipal purposes, a direct annual tax for the year 1901, sufficient to raise the said sum of $14,666.66. To be collected with other municipal taxes, licenses, revenues and public dues, and continuing from year to year until the ultimate payment of said bonds; and no part of said funds so raised as aforesaid shall ever be used for, or appropriated to any other purpose or use whatever, except the payment of the principal and interest of said bonds.

SEC. 4. That there shall be a record made in a well bound record book to be purchased by the city clerk in which the bonds issued shall be registered, giving the number of each bond issued, the amount, the date and maturity thereof, the number of coupons and the amount of each of them and dates of maturity, place of payment and one bond of $1,000 series No. 1, and one coupon of said bond No. 1 shall be recorded in said register as evidence of the form, terms and conditions of said bonds. And when any of said bonds and coupons are paid, the date of payment, the number of the bonds and coupons paid and the amount thereof paid, shall be entered in said register and said bonds and coupons so paid shall be destroyed by the mayor and clerk in the presence of the finance committee of the council, and a certificate of the fact and the date shall be made in said register and signed by the mayor and city clerk and said committee and a report thereof made to the common council by the mayor and finance committee.

SEC. 5. This ordinance shall go into full force and effect on its final passage.

Approved Dec. 3rd, 1900.

W. P. SMALL, Mayor.

Attest
W. M. O'BRYAN, City Clerk.

A copy attest
N. LONG, City Clerk.

May 26/04.
[Seal of City.]
"Exhibit C."
3—145

28 COMMONWEALTH OF KENTUCKY, } *sct:*
City of Owensboro, }

MARCH 11, A. D. 1901.

The common council of the city of Owensboro met in special session:—

Present: W. P. Small, mayor, presiding, and common councilmen, namely, Messrs. Broeker, Cary, Delker, McCarroll, Nevitt, Slaughter, Steitler and Williams (M. B. I pp. 321)

An ordinance entitled "An ordinance amending the third section of an ordinance entitled 'An ordinance authorizing and directing the issue and sale of the bonds of the city of Owensboro, and appropriating $14,666.66 out of the revenues and public moneys of the city for the payment of the semi-annual interest thereof and the creation of a fund for the ultimate payment of the principal thereof' finally passed and approved by the mayor on the 3rd day of December 1900, was publically read before the common council the second time by the city clerk and on motion of Mr. Delker seconded by Mr. Broeker, was put upon its second and final passage; and the roll of members being called, Messrs. Broeker, Cary, Delker, McCarroll, Nevitt, Slaughter, Steitler and Williams voted yea, nays none; and thereupon the same was declared passed. Said ordinance is in words and figures as follows:—

An ordinance amending the third section of an ordinance entitled "An ordinance authorizing and directing the issue and sale of the bonds of the city of Owensboro and appropriating $14,666.66 out of the revenues and public moneys of the city for the payment of the semi-annual interest thereof and the creation of a fund for the ultimate payment of the principal thereof," finally passed and approved by the mayor on the 3rd day of December, 1900.

Be it ordained by the common council of the city of Owensboro:—

SEC. 1. That the third section of an ordinance entitled "An ordinance authorizing and directing the issue and sale of the bonds of the city of Owensboro and appropriating $14,666.66 out of the revenues and public moneys of the city for the payment of the
29 semi-annual interest thereof, and the creation of a fund for the ultimate payment of the principal thereof" finally passed and approved by the mayor on the 3rd day of December A. D. 1900 be amended so that the same shall read as follows, to-wit:—

SEC. 3. That the sum of fourteen thousand six hundred and sixty six and 66/100 dollars is hereby appropriated and set apart out of the revenues and funds of the city to be raised by taxation and otherwise each year, until said bonds are paid, for the purpose of paying the interest on said bonds semiannually and created a sinking fund for the payment of the principal thereof; and for the purpose of pro-

viding a fund for said purpose there shall be, and there is, now hereby levied upon all the taxable property of said city, subject by law to taxation for municipal purpose a direct annual tax for the year 1901 and for each succeeding year up to and including the year 1931, sufficient to raise the said sum of fourteen thousand six hundred and sixty-six dollars and sixty six cents to be annually collected with other municipal taxes, licenses, revenues and public dues, and continuing from year to year until the ultimate payment of said bonds; and no part of said funds so raised as aforesaid shall ever be used for, or appropriated to any other purpose or use whatever, except the payment of the principal and interest of said bonds. And provision to meet the requirements of this section shall be made in the annual budget and appropriation ordinance.

SEC. 2. This ordinance shall go into full force and effect on *on* and after its final passage

Approved March 11/1901.

W. P. SMALL, Mavor.

Attest: W. M. O'BRYAN,
City Clerk.

A copy Attest:
N. LONG,
City Clerk.

May 26/04.

(Seal of City.)

"Exhibit D."

30 UNITED STATES OF AMERICA.

Number 6.

Owensboro Water Bond.

$1000.

Know all men by these presents: That the City of Owensboro in the county of Daviess and Commonwealth of Kentucky, is justly indebted, and for value received, hereby promises to pay to the bearer on the first day of January, A. D. 1931, the principal sum of one thousand dollars, with interest thereon at the rate of four per centum per annum, payable semi-annually on the first day of January and of July in each year on the presentation and surrender of the annexed interest coupons at their respective maturities. Both principal and interest of this bond are hereby made payable at the National Deposit Bank of Owensboro in said city. The said City of Owensboro hereby reserves the right to pay and redeem this bond at any time after ten years from its date upon thirty days' notice of its intention so to redeem having been given by publication in the daily newspaper published in the city of Owensboro having the greatest circulation.

This bond is one of a series issued under the authority of, and in full compliance with the laws of the Commonwealth of Kentucky and in particular an act of the General Assembly of the Commonwealth of Kentucky, entitled, "An act for the government of cites of the third class" approved June 14, 1893, and a two-thirds vote of the qualified electors of said city, voting at an election held therein on November 6th, 1900, and an ordinance duly passed by the common council of said city at a legally held meeting thereof.

And it is hereby certified and recited that said city is a city of the third class and had on said date a population exceeding fifteen thousand souls, and that all acts conditions and things re-
31 quired to be done, happened and performed, and that the amount of this bond, together with all the other indebtedness of said city does not exceed any constitutional or statutory limitation thereon, and that provision has been made for the levy and collection of a direct annual tax sufficient to pay the principal and interest thereof as the same shall become due.

For the prompt payment thereof, both principal and interest at maturity, the full faith, credit and resources of said city are hereby irrevocably pledged.

In witness whereof, the said City of Owensboro has caused this bond to be signed by its mayor and counter-signed by its city clerk under its official seal, and the interest coupons hereto attached to be signed with the lithographed signature of its said clerk, all as of date of the first day of January, A. D. 1901.

—— ——, Mayor.

Countersigned
[L. S.]

—— ——,
City Clerk.

$20.00. The City of Owensboro, Kentucky, No. —.

On the first day of —— A. D., 19— promises to pay bearer on presentation and surrender hereof at the National Deposit Bank of Owensboro, the sum of twenty dollars, being its semi-annual installment of interest due on an Owensboro water bond of $1,000 issued January 1st, 1901.

This January 1st, 1901.

W. M. O'BRYAN,
City Clerk.

"Exhibit E."

Said bill in equity and exhibits are each indorsed as follows, to-wit:—Filed May 26 1904 Thos. Speed, clerk by Dudley Lindsey D. C.

32 And on the same day, to-wit: on the 26th day of May A. D. 1904 there was issued from said clerk's office a subpœna in chancery and copy, a copy of said subpœna is as follows, to-wit:—

The President of the United States of America to the City of Owensboro, in the State of Kentucky (a municipal corporation), Greeting:

You are hereby commanded to appear before our circuit court of the United States of America for the western district of Kentucky at the Federal court hall in the city of Owensboro on the first Monday in July next, to answer a bill of equity exhibited against you in our said court by the Owensboro Water Works Company of Owensboro, Kentucky (a corporation) which you shall in no wise omit, under the penalty of the law.

Witness the Honorable M. W. Fuller, Chief Justice of the Supreme Court of the United States of America and the seal of our [SEAL.] said circuit court hereto affixed, at the clerk's office of said court, in Owensboro, this 26 day of May A. D. 1904 and in the 128 year of our Independence.

Attest:

THOS. SPEED,
C. C. C., K. D.,
By DUDLEY LINDSEY,
His Deputy.

MEMORANDUM.—The defendant to enter its appearance in the suit in the clerk's office on or before the 4th day of July next, the day at which the writ is returnable, otherwise the bill may be taken *pro confesso*.

THOS. SPEED, Clerk,
By DUDLEY LINDSEY,
His Deputy.

A copy of the indorsements on the back of said subpœna *are* as follows, to-wit:—

"Received the within subpœna in chancery on May 26/1904 and on the same day executed the same on the City of Owensboro
33 by delivering a true copy of same to Martin Yewell as mayor of said city at Owensboro, Kentucky. Fee $2.

A. D. JAMES, U. S. Marshal,
By GEO. W. GILLILAND, Deputy.

Returned and filed May 31 1904. Thos. Speed, clerk by Dudley Lindsey D. C."

And on another day, to-wit: on the 6th day of June A. D. 1904 in said clerk's office at rules the following proceedings were had, to-wit:

Rules Circuit Court United States, Western District of Kentucky.

MONDAY, June 6th, A. D. 1904.

In the Clerk's Office—Before the Clerk.

OWENSBORO WATER WORKS COMPANY
v.
THE CITY OF OWENSBORO, KENTUCKY. } 161.

This day came the defendant herein by C. S. Walker, Miller & Todd and George W. Jolly its counsel and filed its demurrer to the bill of complaint herein.

A copy of said demurrer is as follows, to-wit:—

34 In the Circuit Court of the United States for the Sixth Circuit and Western District of Kentucky, *sct.*

THE OWENSBORO WATER WORKS CO.,
Complainant,
vs.
THE CITY OF OWENSBORO, Defendant. } Demurrers by Defendant.

The defendant, The City of Owensboro, comes now by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are herein set forth and alleged, and demurs and says, that the allegations in the bill in this cause are insufficient in law to entitle the complainant to any relief; and for causes of demurrer states the following:

1. That the court has no jurisdiction of this cause; that it appeareth by the complainant's bill that it states no cause of action arising under the Constitution or laws of the United States; no cause of action within the jurisdiction of this court; that this court has no jurisdiction to consider, decide, or determine any of the matters or things set up in said bill and that it is not entitled to the relief prayed for against the defendant.

2. That the complainant has no right, power, or authority, or any legal capacity, to maintain or prosecute this cause, either for itself or for or on behalf of all, or any other owner or owners of real estate, or taxable property in the city of Owensboro, or for any other person or persons whatever.

3. That it appeareth by the complainant's own showing by its said bill of complaint that it is not entitled to the relief prayed against this defendant and that no cause of action and no ground for equitable relief is stated against this defendant herein.

35 4. That all the matters and things therein set up or alleged, have heretofore, before this suit was commenced, in causes

and actions between complainant and defendant, drawn in question, adjudged, decided and finally determined between complainant and defendant.

Wherefore and for divers other good causes of demurrer appearing on said bill, this defendant doth demur thereto and it prays the judgment of the court whether it shall make any answer thereto, and it prays to be hence dismissed with costs.

CHARLES S. WALKER,
MILLER & TODD,
GEORGE W. JOLLY,
Solicitors for Defendant.

We hereby certify that the foregoing demurrers are in our opinion well founded in law.

GEORGE W. JOLLY.
C. S. WALKER.
MILLER & TODD.

STATE OF KENTUCKY, } ss:
County of Daviess, }

The defendant City of Owensboro, by Martin Yewell, its mayor, says the foregoing demurrers are not interposes for delay.

MARTIN YEWELL.

Sworn to before me by Martin Yewell mayor of the city of Owensboro, this May 28, 1904.

HORACE JOLLY, Ex. D. C.

Said demurrer is indorsed as follows, to-wit:—Filed June 6 1904 at rules Thos. Speed, clerk by Dudley Lindsey D. C.

36 And on another day, to-wit:—on the 4th day of August A. D. 1904 in the United States circuit court at Owensboro, Kentucky the following proceedings were had, to-wit:—

THE OWENSBORO WATER WORKS COMPANY OF OWENSBORO, KENTUCKY, a Corporation,
v.
THE CITY OF OWENSBORO, a Municipal Corporation.

It is ordered by the court that the defendant's demurrers filed to the complainant's bill of complaint herein be and they are hereby set for hearing on August 16th, 1904, at ten o'clock a. m., at Louisville, Kentucky.

And on another day, to-wit: on the 16th day of August A. D. 1904 in the United States circuit court at Owensboro, Kentucky, the following proceedings were had to-wit:—

THE OWENSBORO WATER WORKS COMPANY
v.
THE CITY OF OWENSBORO.

This day came the complainant, by R. W. Slack its counsel; came also the defendant by George W. Jolly its counsel. This cause coming on to be heard upon the defendant's demurrer to the complainant's bill of complaint and having been argued by counsel, and the court not being fully advised thereof takes time.

And on another day, to wit:—on the 20th day of August A. D. 1904 in the United States circuit court at Owensboro, Kentucky the following proceedings were had, to-wit:—

OWENSBORO WATER WORKS COMPANY
v.
CITY OF OWENSBORO.

The court now being fully advised of the defendant's demurrer to the complainant's bill of complaint herein, delivered an opinion in writing which is ordered to be filed.—A copy of said opinion is as follows, to-wit:—

37 Not to be reported.

United States Circuit Court, Western District of Kentucky, at Owensboro.

OWENSBORO WATER WORKS CO.
vs.
CITY OF OWENSBORO. } Opinion.

The complainant, a citizen of Kentucky, professing to sue for itself and all persons similarly situated, and probably having in mind the provisions of the Kentucky Code rather than the rules of practice in this court, has brought this bill in equity seeking certain relief against the defendant, also a citizen of Kentucky, respecting certain bonds alleged to have been heretofore issued and now about to be sold by the defendant, and particularly respecting certain sums already collected by taxation under the ordinances of the city under which the bonds were authorized and issued and taxes levied. Especially is it sought to prevent the issuing of an amount of the bonds equivalent to the sum already raised by taxation before a sale of the bonds has been made, it being claimed that otherwise there would be at least $44,000 of taxes raised beyond the amount authorized by the vote of the people referred to in the bill of complaint. It is not claimed that any of the ordinances referred to in the bill were illegally adopted, nor that the bonds issued thereunder were illegally issued. The contrary is conceded, but it is claimed that taxa-

tion to the extent of $44,000 or more will be exacted from the taxpayers of the city, including complainant as one of them, and that that sum has been or will be applied to other uses than those contemplated by the vote of the people, to wit, the erection and maintenance of another waterworks plant, and relief against these results is apparently the main object of the suit, it being insisted
38 that this will violate certain provisions of the Federal Constitution. I incline to think that when reduced to its ultimate analysis the real object of the bill by this taxpayer is to prevent or else remedy a misappropriation of that much of the city's money, a conclusion that is fortified by the fact that the money has already been paid by the taxpayers of the city, and there is no demand for having it refunded, which indeed could probably only be accomplished through an action at law, if at all. Dow *vs.* City of Chicago, 11 Wall. 112.

But whatever may be the proper construction of the bill, the defendant has demurred to it. Some of the alleged grounds of the demurrer do not seem to be clearly or aptly stated, but whether so or not, this court must determine in any event whether, under the judiciary act, it has jurisdiction of the case made by the bill. There being no allegation of diverse citizenship (indeed it is apparent on the face of the bill that both of the litigants are Kentucky corporations, and therefore citizens of that State) the provisions of the judiciary act which are applicable are in this language: "That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution and laws of the United States or treaties made, or which shall be made, under their authority." (1st U. S. Compiled Statutes, page 508.) This paragraph of the statute must furnish the test by which alone the questions of jurisdiction is to be determined.

1. Does the bill show that this is a suit of a civil nature
39 "arising" under the Constitution or laws of the United States?

As it is conceded that the bonds were properly authorized and executed by the defendant; as no legal objection is urged against the form or substance or the ordinance or ordinances levying the taxation, and as it appears at most to be a question of maladministration by the city, including a failure by the defendant to apply the bonds or their proceeds to the purposes contemplated by the people when they voted to issue the bonds, it may not be difficult to see that the citizens and taxpayers have a right to some remedy, but it is extremely difficult and to me impossible to see how any right asserted by the complainant arises under the Constitution or laws of the United States as distinguished from the principles of general jurisprudence. Due process of law was observed in the manner of authorizing and issuing the bonds and in collecting the taxation. All persons who are taxpayers appear to have been put upon an equal foot-

ing, and while, in general terms, it is claimed that the provisions of the 14th amendment to the Constitution of the United States have in some way been violated in the premises, I have not been convinced that this contention is either maintainable or necessarily involved. It may be that a wrong has been done to the taxpayers by some maladministration of the funds already raised by taxation, and it may be said, in general terms, that every right which is denied a citizen subtracts somewhat from the sum of the full measure of justice due to him, but it is not supposed that every such denial will authorize an appeal to this court or give it jurisdiction under the clause of the judiciary act just quoted. In determining the question before me I must look to the allegations of fact made in the bill, as distinguished from mere statements of legal conclusions by the pleader, and I have not been quite able to grasp or to yield to
40 the arguments urged to show that this case comes within that clause, so far as it is sought to establish the character of the claim made by the bill, namely, that it was one which arises under the Constitution of the United States. The court has by no means overlooked the fact that the phrase "cases arising under the Constitution or laws of the United States," etc., has been construed to mean cases where the decision depends upon the construction of the Constitution of the United States or of an act of Congress, though such cases must be those where the constitutional right is directly and not merely incidentally called in question. See Tennessee *vs.* Union and Planters Bank, 152 U. S. 454; Gold, etc. Co. *vs.* Keyes, 96 U. S. 199, and Sloan *vs.* United States, 193 U. S. 614. Having this view, it seems to me to be quite clear that no essential question fairly arising upon the avernments of the bill in this case depends for its determination upon the construction of any provision of the Constitution. Any constitutional question is suggested by argument in the bill rather than by any showing of the facts therein upon which to base the argument, and in determining the case on the merits I think the decision would be that the constitutional claim was not really involved at all rather than that it was either maintainable or unmaintainable. Hence the constitutional question must be regarded as merely incidental, if indeed it is involved in this case in any substantial way. (193 U. S. 614.)

To deal with this phase of the matter somewhat more in detail we may say that when the bill is analyzed with a view to ascertaining how the suit can be one arising under the Constitution or laws of the United States we find no statement of fact and nothing except a conclusion of the pleader to warrant the notion that such is the fact. After showing that in a lawful
41 and proper way, and by authority of a two-thirds vote of the qualified voters of Owensboro, the $200,000 of bonds were duly authorized and executed, the complaint made in the bill is that for a series of years the defendant has levied and collected taxes to pay the interest on the bonds, nearly all of which the city still holds, only $7,000 of them having been sold; that the money thus collected,

except those portions of it which have been used to pay the interest on the bonds which have been sold, is either still held by the defendant or has been wrongfully appropriated by it to uses not contemplated nor authorized by the ordinances under which the bonds were executed, namely, that of erecting the water works plant; that no such plant has been constructed, though certain real estate has been purchased; that the city now proposes to sell all the remaining bonds instead of withholding from sale enough of them to consume the taxes collected and still on hand; and that no interest having really accrued on the unsold bonds for the intervening years, the amount of taxes collected and on hand, and not paid out as interest on the bonds that have been sold, would ultimately be that much in excess of what the people authorized by their vote. It is claimed that this result would deny to the complainant rights which are guaranteed by the 14th amendment to the Constitution of the United States, and, therefore, that this case is one arising under the Constitution of the United States. But as already indicated, it seems to me to be clear that the decision of this case, if tried on its merits, would inevitable turn upon the construction of the laws of Kentucky, guided by general principles of jurisprudence, and not at all upon a construction of the 14th amendment. Double or excessive taxation is not, speaking generally, prohibited to the States by
42 the Federal Constitution, and whether the city of Owensboro has gone further than it had the right to do in collecting the taxes in advance of selling the bonds; whether the complainant has any interest in the money thus collected and accumulated in the treasury of the city, and either not properly applied or else misapplied; whether the city has the right to hold the funds collected, and await further developments as to a wise time for erecting its water works; whether the defendant has misappropriated the money thus collected; whether it has the right to delay the building of the water works, and still hold on to the money collected to pay the interest on the unsold bonds authorized and executed for that purpose; whether the city might not, either now or near the maturity of the bonds, be compelled to abstain from collecting taxes for a period corresponding with the three or four years previous to this date; whether the city could be compelled to call in, if they were sold, enough of the bonds to correspond with the accumulated taxes on hand, and whether the remaining bonds or only that portion of them which would remain after withholding from sale an amount equal to the accumulated taxes, can now be lawfully and properly sold by the city for the purpose of building its water works, are, I think, all questions to be determined exclusively upon a construction of the laws of Kentucky and upon principles of general jurisprudence. In no essential respect can these questions be determinable upon a construction of the Federal Constitution. So we say again, that if any question of Federal constitutional law is involved in this case it is merely incidental, and if so, the principles laid down in Sloan *vs.*

United States, 193 U. S. 614, and cases therein cited, must control.

43 The questions we have suggested above appear to me to be the only ones that could grow out of the facts stated in the bill, and we conclude that the case is not one arising under the Constitution or laws of the United States within the meaning of the judiciary act.

But whether these views be correct or not there is another essential element of jurisdiction which must co-exist with the one we have been discussing, namely, that element which relates to the amount in controversy.

2. This question may be discussed under three aspects.

a. It is urged that at least $44,000 is put in issue by the bill, and indeed the bill does pray for an injunction restraining the city from selling that many of the bonds. There might be plausibility in this view of it were it not for the opinion of the Supreme Court in El Paso Water Co. *vs.* El Paso, 152 U. S. 157. That case cannot, on principle, be easily distinguished from this. It was a suit to enjoin the issue of $100,000 in bonds, and on page 159 of the report the court said:

"We do not deem it necessary to consider the important constitutional question thus presented, for it does not appear from the record that there is over $5,000 in controversy, as is necessary to give this court jurisdiction. The bill is filed by the plaintiff to protect its individual interests, and to prevent damage to itself. It must, therefore, affirmatively appear that the acts charged against the city, and sought to be enjoined, would result in its damage to an amount in excess of $5,000. So far as respects the matter of taxes which, by the issue of bonds, would be cast upon the property of the plaintiff, it is enough to say that the amount thereof is not stated, nor any facts given from which it can be fairly inferred."

While this language, in terms, refers to the jurisdiction of the Supreme Court it is equally applicable to the question of the jurisdiction of this court. The doctrine of the El Paso case is re-affirmed in Colvin *vs.* Jacksonville, 158 U. S. 460.

44 *b.* Again, to support the jurisdiction of this court not only must there be a suit arising under the Constitution or laws of the United States, but by the express terms of the act the *claim of the complainant* must exceed the sum or value of two thousand dollars exclusive of interest and costs. No claim is made in the bill that the aggregate of taxation levied and to be levied upon the complainant's property in the past, at the present, and in the future, growing out of the issue and payment of the $200,000 of bonds and interest thereon, and particularly not as to the $44,000, will ever exceed two thousand dollars. Indeed, it was conceded at the hearing that the aggregate of such taxation would not exceed that sum. But is is claimed, because the complainant professes in its bill to sue on behalf of itself and all other taxpayers similarly situated, and who are alleged to be too numerous to be brought before the court, that

therefore all the bonds, or at least $44,000 of them, are brought in issue, and that of course a sum exceeding two thousand dollars is necessarily involved. Brown *vs.* Trousdale, 138 U. S. 389, is much relied upon by the learned counsel of the complainant, but having very carefully examined that case, where some 300 plaintiffs joined whose united tax liability must have exceeded $2,000, though not so alleged, I am wholly unable to see that it in any wise bears upon this one. The nature of the suit and the questions decided were not only wholly different, but were not analogous to those now raised.

The Kentucky Code of Practice cannot be applied in equity suits in this court, but equity rule 48 is in the following language:

"Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, that court in its discretion may dis-
45 pense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But, in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties."

The court, in this case, has not authorized the complainant to sue for others, nor to dispense with making other persons parties to the suit.

The citizens of Owensboro voted by more than two-thirds majority to authorize the bonds referred to in the bill. The object of doing so was to build up water works in competition with the complainant (by which it was supposed some public benefit would come), and no allegation in the bill shows that any other taxpayer of the city has any interest precisely and to the full extent, similar to that of the complainant. No other taxpayer has joined with the complainant, and there is no averment that any other taxpayer would do so in any event, nor any reason shown why he has not already done so, and it is, to say the least, extremely doubtful whether this is a case where the court, under rule 48, would authorize the complainant, whose real interest, in large part at least, is exceptional, to sue in any capacity which would represent others, or would authorize complainant, under rule 48, to dispense with other parties. The whole contention is that, by professing to sue for the benefit of all the taxpayers the complainant can put $44,000 or more in issue or in some way aggregate their interests, if any, in the question so as to make up a sum exceeding two thousand dollars. But this overlooks the fact, that, peradventure, all the other taxpayers might desire to condone the alleged misdoings of their council, or they might prefer to pay the taxation for some other reason best known to themselves. In determining the demurrer we cannot consider anything but the questions growing out of complainant's interest as a
46 taxpayer. We can have no regard to what may be its interests as a competitive water company, and we conclude that certainly the bill does not make a case within our jurisdiction, inasmuch as the complainant's individual direct interest in the question

of the bonds and taxation is not shown to exceed the sum of value of two thousand dollars. (152 U. S. 157).

It cannot be forgotten nor overlooked that if by merely assuming to sue for the benefit of all others similarly situated, and without the action of the court in exercising its discretion under rule 48, the complainant could thereby evade the limit of two thousand dollars, there would be little wisdom in fixing that limit by statute. And it should not be forgotten that when rule No. 48 is acted upon the provisions of the judiciary act as to the sum or value required to give jurisdiction are not affected. The $2,000 provision cannot be abrogated by anything under rule 48, and nothing, we apprehend, was further from the mind of the Supreme Court in framing that rule than such a result. Until others having similar interests with complainant, and most of whom reside (we apprehend) in Owensboro, actually unite in the bill and in the prayer for relief, or some reason is shown for dispensing with them, as parties the grievance of the complainant must be held to be individual merely and its suit as one entirely between itself alone on one side and the defendant alone on the other. Complainant can only protect its own interest, not that of others. If this be true it follows that the jurisdictional requisite as to amount involved, fixed by the judicial act, has not been met. This phase of the case, it seems to me, must be ruled by the opinions of the Supreme Court in El Paso Water Co. *vs.* El Paso, 152 U. S. 157, and Colvin *vs.* Jacksonville, 158 U. S. 457, before referred to.

c. Again it is urged in support of the jurisdiction that the
47 complainant may sue singly, because it states in the bill in very general terms that it represents a large class of persons similarly situated with itself who have a common and general interest, and that, therefore, it has the right under a recognized rule of equity practice to sue as the representative of a large class made up of numbers so great as to make it impracticable to bring all of them before the court within a reasonable time. Several authorities are cited, typical among which are Smith & Swormstedt, 16 Howard, 302, Story's Equity Pleadings, secs. 97 to 120. Undoubtedly the rule is well established, but its reach in the Federal practice is quite limited, and it possibly may be to some extent controlled by equity rule 48. The almost universal principle is that litigants can only sue or defend for themselves alone, but there are a few exceptions of cases in which a limited number may sue or defend as representatives of a class. The rule for determining cases where such exceptions may be allowed is laid down by the Supreme Court in Scott *vs.* Donald, 165 U. S., at page- 115, 116 and 117, where the court states and approves what was said by Mr. Justice Nelson at the circuit in Cutting *vs.* Gilbert, 5 Blatchford, 259, 261. If we follow this guide, and especially as it is illustrated by El Paso Water Co. *vs.* El Paso, 152 U. S. 157, and Colvin *vs.* Jacksonville, 158 U. S. 460, we must find against the complainant's contention on the proposition, particularly, first, as no other Owensboro taxpayer joins or is shown

to be willing to join in the suit; second, as no reason is given why other Owensboro taxpayers might not join if they chose, and, third, as while other taxpayers may have claims against the defendant based upon similar grounds and the same questions, their interests in the fund or in the question of payment of taxes are not, in the proper sense, common with those of the complainant, but
48 each one of them has a separate and individual right only to the extent of his own taxes.

It may be also observed that the peculiar attitude of the complainant in respect to the particular issue of bonds voted by the people of the city for the express purpose of creating a rival for the complainant, *prima facia*, at least shows complainant's interest in the question to be exceptional, and probably as having nothing really in common with the other taxpayers of Owensboro. Certainly the court regards it as a case where the bill, on its face, should show how the interests of the complainant, which naturally would be to retard the erection of a rival, is the same as that of the taxpayers who naturally might be supposed to desire the reverse of that result, especially as the voting of the bond issue by a two-thirds majority indicated the desire of the citizens generally to have another water works plant established.

The bill, I think, fails to meet these requirements, which seems clearly to be demanded by the rule laid down in Smith *vs.* Wormstedt, 16 Howard, at page 303, in this language:

"In all cases where exceptions to the general rule are allowed, and a few are permitted to sue and defend on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried."

If at this point, and in this connection, equity rule 48 has any applicability I think the bill does not show a state of facts which should move the discretion of the court to dispense with other taxpayers as co-complainants so as fairly to represent the interests of the taxpayers generally as against their city government if this be a case where a few should be permitted to sue as representatives of a class—a proposition I do not concede.

49 I am, therefore, clearly of opinion that upon either one or all of the grounds indicated the bill fails to show affirmatively that this court has jurisdiction of the cause of complaint therein alleged.

The demurrer must be sustained, and the bill will be dismissed for want of jurisdiction of this court to hear and determine the cause. Orders to that effect may be prepared now unless the complainant desires to file amendment tendered at the hearing. That amendment does not in anywise change the bill so far as the question of jurisdiction is concerned, and it may be that counsel will readily stipulate to permit it to be filed, and that the demurrer may apply to it as well as to the original bill. No further argument will be necessary as the demurrer will apply as strongly to the bill when

thus amended as it does now, and the case can be fully adjudged at once if it will facilitate the desire of counsel for an early appeal. Of course the court will certify upon the question of jurisdiction.

WALTER EVANS, Judge.

Aug. 20, 1904.

50 And on another day, to-wit: on the 7th day of September A. D. 1904 in the United States circuit court at Owenboro, Kentucky, the following proceedings were had, to-wit:—

OWENSBORO WATER WORKS COMPANY
v.
CITY OF OWENSBORO.

Pursuant to the opinion of the court delivered and filed herein on August 20, 1904, it is now ordered, adjudged and decreed by the court that the defendant's demurrer to the bill of complaint, be and the same is allowed and sustained, and the complainant declining to plead further, it is further ordered, adjudged and decreed by the court that the bill of complaint herein be and the same is dismissed for want of jurisdiction in this court to hear and determine the cause, and it is further ordered, adjudged and decreed that the defendant recover of the complainant its costs herein expended the same to be taxed by the clerk and for which the defendant may have execution.

Certificate.

And the court and the judge who heard the cause now and hereby certify that one issue considered and adjudged upon the demurrer to the bill of complaint and upon the final judgment in the case was, whether this court had jurisdiction of the action or power to grant the relief prayed for by the complainant or any part thereof and the court, as appears from its said opinion and by the judgment herein considered and adjudged that it had no jurisdiction in the premises and the question of jurisdiction alone is now and hereby certified under the act of Congress to the Supreme Court of the United States for decision.

(Signed) WALTER EVANS, Judge.

51 And on another day, to-wit: on the 29th day of November A. D. 1904 at the November term of the said circuit court of the United States at Owensboro, Kentucky, the following proceedings were had, to-wit:—

THE OWENSBORO WATER WORKS COMPANY OF OWENSBORO, Kentucky,
v.
THE CITY OF OWENSBORO, KENTUCKY.

This day came the complainant by W. T. Ellis, J. D. Atchison and Little & Slack its counsel and filed its petition for an appeal and assignment of errors herein and on its motion it is ordered that an appeal be allowed to the Supreme Court of the United States upon condition that the complainant do execute an appeal bond herein in the penalty of $300, conditioned according to law. Thereupon came said complainant The Owensboro Water Works Company of Owensboro, Kentucky by its said counsel and tendered said bond with J. J. Sweeney as surety, which bond is now approved and ordered to be filed,

A copy of said petition for appeal is as follows, to-wit:

Circuit Court of the United States for the Sixth Circuit, Western District of Kentucky, Owensboro Division, at Owensboro, Kentucky.

THE OWENSBORO WATER WORKS COMPANY of Owensboro, Kentucky (a Corporation), Complainant,
vs.
THE CITY OF OWENSBORO, a Municipal Corporation, Defendant.
} In Equity. No. 161.

The complainant, The Owensboro Water Works Company of Owensboro, Kentucky, a corporation, conceiving itself aggrieved by the decree made and entered herein in the above entitled cause on the 7th day of September 1904 sustaining defendant's demurrer to complainant's bill, and dismissing its action for want of jurisdiction, does hereby appeal from said order and decree to the Su-
52 preme Court of the United States, for the reasons and for the grounds set forth and specified in the assignment of errors, which is filed herewith, and the said complainant, The Owensboro Water Works Co., of Owensboro, Kentucky, prays that this appeal may be allowed, and that the transcript of the record, proceedings and papers upon which said order was made, may be sent to the Supreme Court of the United States, together with the certificate certifying to the Supreme Court of the United States the question of jurisdiction so decided by this court.

W. T. ELLIS,
J. D. ATCHISON,
LITTLE & SLACK,
Solicitors for Complainant.

Said petition for appeal bears indorsement as follows, to-wit:—Filed November 29th A. D. 1904 Thos. Speed, clerk by Dudley Lindsey, D. C.

A copy of said assignment of errors is as follows, to-wit:

Circuit Court of the United States for the Sixth Circuit, Western District of Kentucky, Owensboro Division, at Owensboro, Kentucky.

THE OWENSBORO WATER WORKS COMPANY of Owensboro, Kentucky (a Corporation), Complainant,
vs.
THE CITY OF OWENSBORO, a Municipal Corporation, Defendant.
} Assignment of Errors.

And now on this the 29th day of November, 1904, comes complainant, The Owensboro Water Works Company, of Owensboro, Ky., a corporation, by its solicitors, W. T. Ellis, J. D. Atchison, and Little & Slack, in the above entitled action, and says that the decree and orders made in said cause are erroneous, and against the just rights and equities of complainant, and those for whom it sues, and contrary to the law.

1st. Because the court erred in sustaining the demurrer interposed by the defendant to the original bill, and in holding
53 and deciding that the facts stated in said bill were not sufficient to constitute a cause of action, in complainant's favor, and the other tax payers of the city of Owensboro, and not entitled to the relief prayed for in said bill and that this court does not have jurisdiction of the cause of action stated.

2nd. The court erred to complainant's prejudice in dismissing its bill.

Wherefore, said complainant prays that said judgment be reversed, and that said court be ordered and directed to enter a decree in accordance with the prayer of the bill, and requiring the defendant to answer, and finally for the perpetuation of the injunction on final hearing.

W. T. ELLIS,
J. D. ATCHISON,
LITTLE & SLACK,
Solicitors for Complainant.

Said assignment of errors bears the following indorsement, to-wit:—Filed November 29th A. D. 1904. Thos. Speed, clerk by Dudley Lindsey D. C."

A copy of said appeal bond is as follows, to-wit:—

Circuit Court of the United States. Western District of Kentucky, Owensboro Division.

THE OWENSBORO WATER WORKS COMPANY OF OWENSBORO, Kentucky,
vs.
THE CITY OF OWENSBORO.

Know all men by these presents that we The Owensboro Water Works Company of Owensboro principal and James J. Sweeney surety are held and firmly bound unto The City of Owensboro in the sum of three hundred dollars to be paid to the said The City of Owensboro executors or administrators. To which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors, and administrators, formly by these presents.

54 Sealed with our seals, and dated this 29th day of November A. D. 1904.

Whereas, the above named The Owensboro Water Works Company hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above entitled suit, by the circuit court of the United States for the western district of Kentucky, at Owensboro.

Now, therefore, the condition of this obliga[illegible] is such, that if the above named The Owensboro Water Works [illegible]mpany shall prosecute its said appeal, to effect, and answer all costs, if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE OWENSBORO WATER WORKS CO. OF OWENSBORO, KY.,
By JAS. J. SWEENEY, Pres.
JAMES J. SWEENEY, Se't'y.

Sealed and delivered in presence of—
HENRY F. CASSIN,
Deputy clerk U. S. Courts.

Approved November 29th 1904.
WALTER EVANS, Judge.

Said bond bears indorsement as follows, to-wit:—Filed November 29th A. D. 1904. Thos. Speed, clerk by Dudley Lindsey D. C.

55 UNITED STATES OF AMERICA,
Western District of Kentucky, Owensboro Division, } ss:
Sixth Judicial Circuit,

To the City of Owensboro, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington, D. C., on the * 27th day of December next, pursuant to an appeal allowed by the circuit court of the United States for the western district of Kentucky, Owensboro division, wherein The Owensboro Water Works Company of Owensboro, Kentucky, is appellant, and you are appellee to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 29th day of November, in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States of America the one hundred and twenty-ninth.

[Seal Circuit Court of the United States, Wes. Dist. of Ky., O'boro Div.]

WALTER EVANS, Judge.

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*Not exceeding 30 days from the day of signing.

56 Executed the within citation on the City of Owensboro, Kentucky, on November 29th, A. D. 1904 at Owensboro, Ky., by delivering a true copy thereof to Martin Yewell as mayor of said city.

Fee $2.00.

A. D. JAMES,
U. S. Marshal, W. K. D.,
By GEO. W. GILLILAND, D. M.

[Endorsed:] 2213E-212 161 The Owensboro Water Works Co. vs. City of Owensboro Citation.

57 Circuit Court of the United States for the Sixth Judicial Circuit and Western District of Kentucy, Owensboro Division, at Owensboro, Kentucky.

I, Thos. Speed, clerk of the circuit court of the United States for the sixth judicial circuit and western district of Kentucky, Owensboro division, do hereby certify, that the within and foregoing 55 pages contain a full and true transcript of the record of the proceedings had in said court in the suit wherein The Owensboro Water Works Company, of Owensboro, Kentucky, is complainant and The

City of Owensboro, Kentucky, is defendant as the same remains of record in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court at my said office this 21st day of December A. D. 1904 and the 129th year of our Independence.

[Seal Circuit Court of the United States, Wes. Dist. of Ky., O'boro Div.]

THOS. SPEED, Clerk,
By DUDLEY LINDSEY,
Deputy Clerk.

Endorsed on cover: File No. 19,576. W. Kentucky C. C. U. S. Term No. 145. The Owensboro Water Works Company of Owensboro, Kentucky, appellant, *vs.* The City of Owensboro. Filed December 31st, 1904. File No. 19,576.

APPELLANT'S

BRIEF

FILE COPY.

Office Supreme Court U. S.
FILED
NOV 27 1905
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States

145

The Owensboro Water Works Co.,
of the City of Owensboro, Kentucky, . Appellant

v.

The City of Owensboro, ... Appellee

BRIEF FOR APPELLANT

JOHN D. ATCHISON,
WILLIAM T. ELLIS,
Attorneys for Appellant

LITTLE & SLACK,
Counsel

Howard Printing Co., Owensboro, Ky.

Supreme Court of the United States

The Owensboro Water Works Co.,
of the City of Owensboro, Kentucky, . Appellant

v.

The City of Owensboro, ... Appellee

BRIEF FOR APPELLANT

This action was instituted by appellant in its own behalf as a taxpayer, and on behalf of the other taxpayers of the City of Owensboro, to enjoin the sale of bonds, issued by the city, to the amount and value of FOURTY-FOUR THOUSAND DOLLARS. The circuit court sustained appellee's demurrer to the bill of complaint, and dismissed it for want of jurisdiction, whereupon the presiding judge, duly certified to this Court the question of jurisdiction alone. (Rec. 31).*

*References are to pages of printed record.

The facts, averred in the bill of complaint, are as follows:

On October 10, 1900, an ordinance was passed by the common council of the City of Owensboro, providing for a special election in the city, in November, 1900, to obtain the assent of the voters, authorizing the common council to borrow the sum of TWO HUNDRED THOUSAND DOLLARS, by issuing the bonds of the city for that amount, for the purpose of erecting a system of water works in and for the city and its inhabitants, the bonds to bear date January 1, 1901, and made payable at the National Deposit Bank, of Owensboro, Kentucky, in thirty years, with interest, payable semi-annually. (Rec. 14, Ex. B).

On December 3, 1900, an ordinance was passed declaring the vote to have been in favor of said proposition, and authorizing the issuance and sale of the bonds, as soon as practicable after the first day of January, 1901.

This ordinance, as amended by an ordinance passed March 11, 1901, provided:

> "Sec. 3. That the sum of fourteen thousand six hundred and sixty-six and 66-100 dollars is hereby appropriated and set apart out of the revenues and funds of the city to be raised by taxation and otherwise each year, until the payment of the principal thereof; and for the purpose of providing a fund for said purpose there shall be, and there is, now hereby levied upon all the taxable property of said city, subject by law to taxation for municipal purpose a direct annual tax for the year 1901 and for each succeeding year up to and including the year 1931, sufficient to raise the said sum of fourteen thousand

six hundred and sixty-six dollars and sixty-six cents to be annually collected with other municipal taxes, licenses, revenues and public dues, and continuing from year to year until the ultimate payment of said bonds, and no part of said funds so raised as aforesaid shall ever be used for, or appropriated to any other purpose or use whatever, except the payment of the principal and interest of said bonds. And provision to meet the requirements of this section shall be made in the annual budget and appropriation ordinance."

(Exhibits C and D, Rec. 15-19).

In compliance with said ordinance the mayor of the city executed 200 bonds of $1,000 each, of date January 1, 1901, payable thirty years thereafter, at said bank, bearing four per cent. interest per annum, payable semi-annually, evidenced by sixty attached coupons for $10.00 each.

Ordinances were duly passed, in and for each of the years 1901, 1902, 1903, 1904, levying an advalorem tax upon the property in the city, and appropriating, out of the taxes so to be collected, the sum of $8,000 for the payment of the annual interest on said bonds, and $6,666.66 for the creation of a sinking fund for their ultimate payment.

At the time this complaint was filed (May 26, 1904,) appellee had collected of the taxpayers of the city, the sum total of $44,000 of taxes levied in the years 1901, 1902, 1903, for such purpose, and out of this sum it had expended $20,000 in the purchase of land, and sinking wells in the erection of said water works system, and the remaining $26,000 had been wrongfully

and illegally expended. During each of said years the city had collected of the taxpayers the full amount it had the power to collect and had expended the entire amounts collected, and had no means of replacing any part of said $44,000, except by additional levies upon the taxpayers.

Only seven of the bonds had been sold, and appellee was about to sell the entire remaining 193 bonds, without giving purchasers notice or information of the existing facts, in order that they should be innocent holders, of negotiable paper, and thus enabled to collect of the taxpayers and their property, the full amount of $200,000, notwithstanding the previously enforced payment of $44,000.

SPECIFICATIONS OF ERROR.

"1st. The court erred in sustaining the demurrer interposed by the defendant to the original bill, and in holding and deciding that the facts, stated in the bill, were not sufficient to constitute a cause of action, in complainant's favor, and the other taxpayers of the City of Owensboro, and not entitled to the relief prayed for in said bill and that the court did not have jurisdiction of the cause of action stated.

"2d. The court erred to complainant's prejudice in dismissing its bill."

(See assignment of errors Rec. 34.)

The decree appealed from is based upon the written opinion

filed by the court (Rec. 24-32) and is erroneous, because complainant shows:

(1) That the taxpayers are about to be deprived of their property without due process of law, in violation of the fourteenth amendment to the Constitution of the United States, and the Constitution and Statutes of the State of Kentucky.

(2) Because complainant has the right, as a taxpayer, to maintain this action in its own behalf and on behalf of all the other taxpayers, who are too numerous to be brought before the court, as there is nothing in the record to show that it will not truly represent the interest of such other taxpayers.

The court erred in holding adversely to appellant upon each of the foregoing propositions.

ARGUMENT.

The question as to whether the circuit court of the United States has jurisdiction of this case depends alone upon the questions, (1) as to whether the bill of complaint shows the taxpayers are about to be deprived of their property without due process of law, and if so (2) whether the one taxpayer in this case can maintain the action in behalf of the other taxpayers, as well as its own, so as to put in issue a sufficient amount to give the court jurisdiction, and, incidentally, (3) whether it appears that the complainant will not truly represent the interest of the other taxpayers.

(1) The present Constitution of the State of Kentucky, sec. 157, provides:

"No county, city, town, taxing district, or other municipality shall be authorized or permitted to become indebted in any manner or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose; and any indebtedness contracted in violation of this section shall be void. Nor shall such contract be enforcable by the person with whom made; nor shall such municipality ever be authorized to assume the same."

And sec. 180:

"Every act enacted by the General Assembly, and every ordinance and resolution passed by any county, city, town, or municipal board or local legislative body, levying a tax, shall specify distinctly the purpose for which said tax is levied, and no tax levied and collected for one purpose shall be devoted to another purpose."

The bill of complaint alleges the City of Owensboro to be a city of the third class under the provisions of an act of the General Assembly of Kentucky, passed June 14, 1893, contained in Kentucky Statutes, sections 3235 to 3840. (Rec. 2).

Under sections 3262 and 3284. the act provides:

"§ 3262. Upon the isssual of bonds by any city as

provided for in this act, it shall be the duty of the legislative board or the city council to cause the sinking fund of the city an amount sufficient to pay the interest thereon and create a fund for their redemption from time to time, or for their redemption at maturity: and whenever there is a sufficient sum in the sinking fund over and above the amount required for the payment of interest, it shall be used for redemption of so many of said bonds as practicable."

"§ 3284. Subject to the limitations by the Constitution and this act, the council shall have the power to contract debts and to borrow money, and to issue the bonds of the city therefor, and to control the finances and the property of the city. * * No bonds of the city shall be sold below par."

Under the ordinance of December 3, 1900, heretofore quoted, it was expressly provided:

"No part of said funds so raised as aforesaid shall ever be used for, or appropriated to any other purpose or use whatever, except the payment of the principal and interest of said bonds. And provision to meet the requirements of this section shll be made in the annual budget and appropriating ordinances."

Under the provisions of the Constitution of Kentucky above quoted it was necessary to obtain the assent of the voters to issue the bonds, because it created an indebtedness exceeding the income of one year, and it was necessary for the ordinance to specify the purpose for which the tax was levied, and that it should not be devoted to any other purpose.

The statute provides that when bonds are issued it shall be the duty of the city council to annually carry to the sinking fund a sufficient sum to pay interest and create a fund for the redemption of the bonds at maturity. In compliance with these provisions of the Constitution and Statutes the ordinance, (under which the vote was taken and the bonds were issued) provided for an annual levy of taxes sufficient to raise the sum of $14,666.66, to create a sinking fund for their payment, and that "no part of said funds so raised as aforesaid shall ever be used for, or appropriated to, any other use or purpose whatever." Therefore, under the constitutional and statutory provisions, the ordinance constituted a contract between the voters and the municipality by which the voters agreed to pay a specific sum for a specified purpose, and the municipality agreed to expend that sum and no more, and for no other purpose.

Under the facts, as stated in the bill of complaint, it appears that the taxpayers have paid into the city treasury, in advance of the sale of the bonds, the sum of $20,000 to meet the principal of the bonds, and $24,000 to meet interest. Instead of carrying these sums to the sinking fund, as required by law, and the ordinance, the city council misappropriated $24,000 and used $20,000 towards building the plant, and now proposes to sell the entire issue of bonds. The bonds cannot be sold at less than par, so it follows the municipality will receive the full sum of $20,000 from the purchaser, in addition to the sum of $44,000 already collected of the taxpayers, and as the amount realized from the sale of the bonds cannot be used for any other purpose than building the water works plant the city will eventually ex-

pend $220,000 of the taxpayers money for that purpose, when they had limited the expenditure to $200,000.

It is apparent that while the taxpayers only agreed to incur an indebtedness of $200,000 they will eventually be compelled to pay $224,000, because they will be compelled to pay the full amount of the bonds at maturity.

If the entire issue of bonds can now be sold, notwithstanding the previous collection of $20,000 under the ordinance and its expenditure towards the erection of the plant, then there can be no reason why the city could not, near the end of the thirty year period, sell the entire issue, after having previously collected and expended $200,000 for that purpose, and thus expend $400,000 instead of $200,000 as authorized by the voters. The bare statment of such proposition carries its own refutation.

In Commissioners, etc. v. Zimmerman, 101 Ky. 435:

It appeared that the Sinking Fund Commissioners of Louisville were authorized to issue and sell bonds and use the proceeds in paying off outstanding bonds. They issued bonds for $588,000 bearing interest from April 1, 1897, with which to redeem bonds for a like amount that bore interest until July 1 and August 1, 1897. They secured a purchaser who was willing to pay $40,000 premium upon the old bonds, and Zimmerman, a taxpayer, sued to enjoin the sale. The court held:

(1) That if the sale should be cousummated the taxpayers would have to pay double interest from April 1st to August 1st, and "for this time this *excess* is in fact a *new indebtedness*, and, being without warrant or authority of law, is void."

(2) That they have the right to only sell bonds sufficient to

raise $588,000. For if they are permitted to sell more bonds than were sufficient to pay this indebtedness, then to the extent of this premium it would be the creation of a new indebtedness to that extent."

The right of Zimmerman to enjoin was recognized by the court notwithstanding he was apparently protected by the constitutional provision, (sec. 157) which provides, in substance, that such an indebteness as was attempted to be created by the commissioners, without the assent of the taxpayers shall be void; nor shall such contract be enforcible by the persons with whom made; nor shall such municipality ever be authorized to assume the same.

By the sale of the entire issue of negotiable bonds, involved in this case, the officers of the city, who are officers created by the state statute, and thus officers of the state, [redacted] will place an unlawful encumbrance upon the property of the taxpayers by which they will be compelled to pay $44,000 more than they agreed to pay, and thus be deprived of their property to that extent without due process of law.

In Dundee Mortgage M. T. I. Co. v. School Dist. No. 1, (19 Fed. 359), the question was as to whether a state statute, under which the school district was claiming the right to assess the mortgage of the Dundee M. T. I. Co., was void, because the statute was in conflict with the state constitution. The court said: (page 370)

> "This being a suit between a foreign corporation and citizens of this state, the court has jurisdiction of the con-

troversy on account of the citizenship of the parties, whether a federal question is involved in the controversy or not. The defendants are intending and attempting to sell and dispose of the notes and mortgages of the plaintiff respectively assessed by them for the non-payment of an illegal tax; and this being repeated from year to year until the maturity and payment of the notes, the plaintiff may be compelled to maintain a corresponding number of actions at law to recover the amounts so collected, to prevent and avoid which an injunction will be allowed. Pom. Eq. Jur. secs. 243-275. But the act under which the defendants are proceeding to dispose of the plaintiff's property for taxes, being void, such disposition constitutes a violation of section 1, of the fourteenth amendment to the Constitution of the United States, which forbids a state "to deprive any person of life, liberty, or property without due process of law," and therefore this court has jurisdiction of the case, as one arising under said constitution, *without reference to the citizenship of the parties thereto.* If the defendants, acting for and in the name of the state, are allowed to take the plaintiff's property for taxes assessed under a void law, the state would thereby deprive the plaintiff of such property without due process of law, contrary to the Constitution of the United States. Railroad Tax Case, 8 Sawy, 251,287; (S. C. 13 Fed. Rep. 722.")

In Southern Railway Co. v. North Carolina Corp. Comn. (97 Fed. Rep. 513.) it was held: (sylabus)

"A suit by a railroad company to restrain the author-

ities of a state from the collection of a tax levied on its property, on the grounds that the assessment on which such tax was levied was made without authority of law, and that such assessment was discriminative, and intended to impose on railroad property an undue share of the burdens of state taxation, is one which involves the construction and application of the provisions of the Constitution of the United States prohibiting the taking of property without due process of law, and securing to all persons the equal protection of the laws, of which a federal court has jurisdiction, without regard to the citizenship of the parties."

"The North Carolina Act of March 6, 1899, creating the North Carolina corporation commission, and defining their duties and powers, did not clothe such commission with authority to appraise and assess railroad property for taxation, nor was such authority given by any subsequent legislation."

In Ex Parte, Commonwealth of Virginia, (100 U. S. 339) it was held: (sylabus)

"3. The inhibition contained in the fourteenth amendment means that no agency of the State, nor of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. *Whoever by virtue of public position under a state government*, deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the consti-

tutional inhibition; *and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.* Otherwise the constitutional inhibition has no meaning and the state has clothed one of its agents with power to annul or evade it.

"4. The constitutional amendment was ordained for a purpose. It was to secure equal rights to all persons, and to insure to all persons the enjoyment of such rights. Power was given to Congress to enforce its provisions by appropriate legislation. Such legislation must act upon *persons;* not upon the abstract thing denominated a state, but upon the persons who are the agents of the state in the denial of the rights which were intended to be secured. Such is the Act of March 1, 1875, and is fully authorized by the constitution.

"5. The act of defendant, in selecting jurors, was a ministerial, not a judicial act; and being charged with the performance of that duty, although he derived his authority from the state, he was bound, in the discharge of his duties, to obey the Federal Constitution and the laws passed in pursuance thereof."

This question was so thoroughly considered by this Court in Chicago B. & Q. R. Co. v. Chicago (166 U. S. 226) that we take the liberty of making the following elaborate quotation:

"The city contends that the question as to the amount of compensation to be awarded to the railroad company was one of local law merely, and as that question was determined in the mode prescribed by the constitution and

laws of Illinois, the company appearing and having full opportunity to be heard, the requirement of due process of law was observed. If this position be sound, it is an end of the case, and we need not determine whether the state court erred in not recognizing the principles of law embodied in the instructions asked by the railroad company.

"It is therefore necessary to inquire at the outset whether 'due process of law' requires compensation to be made or secured to the owner of private property taken for public use, and also as to the circumstances under which the final judgment of the highest court of a state in a proceeding instituted to condemn such property for public use may be reviewed by this court.

"It is not contended, as it could not be, that the Constitution of Illinois deprives the railroad company of any right secured by the fourteenth amendment. For the state constitution not only declares that no person shall be deprived of his property without due process of law, but that private property shall not be taken or damaged for public use without just compensation. But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the state, to its legislative, executive and judicial authorities, and, therefore, whoever *by virtue of public position under a state government deprives another of any right protected by that amendment against any deprivation by the state, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.* This must be so, or as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or

evade it.' Ex Parte Virginia 100 U. S. 339, 346, 347, (25; 676, 679); Neal v. Deleware, 103 U. S. 370 (26; 567); Vick Co. v. Hopkins, 118 U. S. 536 (30: 220). These principles were enforced in the recent case of Scott v. McNeal, 154 W. S. 34 (38: 896), in which it was held that the prohibitions of the fourteenth amendment extended to 'all acts of the state, whether through its legislative, its executive, or its judicial authorities;' and, consequently it was held that a judgment of the highest court of a state, by which a purchaser at an administration sale, underanorder of a probate court, of land belonging to a living person who had not been notified of the proceedings, deprived him of his property without due process of law contrary to the fourteenth amendment.

"Nor is the contention that the railroad company has been deprived of its property without due process of law entirely met by the suggestion that it had due notice of the proceedings for condemnation, appeared in court, and was admitted to make defense. It is true that this court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws, operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distribution of justice—the court having jurisdiction of the subject matter and of the parties, and the defendant having full opportunity to be heard—met the requirement of due process of law. United States v. Cruikshank, 92 U. S. 542, 554, (23; 588, 592); Leeper v. Texas, 139 U. S. 462, 463, (35; 225, 227). But a state may not, *by any of its agencies*, disregard the prohibition of the fourteenth amendment. Its judicial authorities may

keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet 'it might be that its final action would be inconsistent with that amendment.' In determining what is due process of law regard must be had to substance, not to form. This court, referring to the fourteenth amendment, has said: 'Can a state make anything due process of law, which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation.' Davidson v. New Orleans, 96 U. S. 97, 102, (24; 616, 619). The same question could be propounded, and the same answer should be made, in reference to judicial proceedings inconsistent with the requirements of due process of law. If compensation for private property taken for public use is an essential element of due process of law as ordained by the fourteenth amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state within the meaning of that amendment."

Summarizing these decisions we find the courts holding, (1) as in the Dundee case, that the officers of a school district should be enjoined from collecting a tax levied under a void statute, and that the *acts of the school district officers constituted a deprivation of property without due process of law.*

(2) And as in the Southern Ry. case where the *officers of*

the state were exceeding the powers conferred upon them by statute.

(3) And as in Ex Parte Comth. of Va. where there was no claim that the petitioner was deprived of his liberty by reason of any *law* of the state, but based his claim solely upon the *illegal act of the judge* who presided upon his trial.

(4) And as in the Chicago R. R. case where both the constitution and statute of the state guaranteed the fullest protection and yet, because it was complained that the *act of the court*, constituted a deprivation of property without due process of law, the complainant presented a federal question for adjudication by the supreme court.

It is immaterial as to the means adopted to deprive the tax payers of their property, or the mode by which it is to be done. The constitution of the state expressly declares their interests shall be protected, and the ordinances, under which the bonds in controversy were issued, follow the mandate of the constitution, to the letter, but the officers of the city, created under the laws of the state, are officers of the state, and they are attempting to so burthen the taxpayers, by a sale of the bonds, as that the tax payers will be illegally deprived of their property, and this illegal deprivation is necessarily a deprivation without due process of law.

THE CIRCUIT COURT OF THE UNITED STATES HAS JURISDICTION.

(2) It is contended by appellee that under the bill of com-

plaint appellant has only put in issue the amount of its taxes involved, which it is conceded is less than $2,000, and, therefore, the court has no jurisdiction. This contention is based upon the assumption that one taxpayer cannot sue on his own behalf, and that of the other taxpayers, without some of the others joining with him as complainant.

In Brown v. Trusdale, &c., 138 U. S. 389, it appeared that several hundred taxpayers of Muhlenberg County, Ky., for themselves, "*as well as for and on behalf of all other taxpayers* in the said county of Muhlenberg, and for the benefit likewise of said county" filed their bill of complaint in the state court against the county judge, sheriff, and funding board, and two bond holders residing in the county, and all holders of bonds issued by the county in favor of the E. & P. R. R.

The petition alleged, upon various grounds, the invalidity of the issue of the bonds and sought an injunction against any tax being levied, and for a decree that the bonds be declared invalid. A temporary injunction was granted.

Subsequently two non-resident bond holders filed their intervening petitions, and petitions for transfer of the action to the U. S. Circuit Court, and the transfer was made and the motion to remand overuled, and the temporary injunction was dissolved upon the face of the petition and exhibits. Answers were filed by the non-resident petitioners, and upon an agreed state of facts the bill was dismissed.

This Court, upon appeal, held "The grievance complained of was common to all the plaintiffs *and to all whom they pro-*

fessed to represent" and "the rule applicable to plaintiffs each claiming under a separate and distinct right, in respect to a separate and distinct liability, and that contested by the adverse party, is not applicable here." And "The amount in dispute, *in view of the main controversy*, far exceeded the limit upon our jurisdiction," etc.

In Smith vs. Swormstedt, (16 How. at page 302) where a similar question was involved, the court said:

> "An objection was taken, on the argument, to the bill for want of proper parties to maintain the suit. We think the objection not well founded.
>
> "The rule is well established, that where the parties interested are numerous, and the suit is for an object common to them all some of the body may maintain a bill on behalf of themselves and of the others; and a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest.
>
> "(Story's Eq. Pl. secs. 97, 98, 99, 103, 107, 110, 111, 116, 120; 2 Mitf. Pl., Jer, Ed 167, 2 Paige, 19; 4 Mylne & Cr., 134, 619, 2 De Gex & Smale, 102, 122.)
>
> "Mr. Justice Story, in his valuable treaties on equity pleadings, after discussing this subject with his usual research and fullness, arranges the exceptions to the general rule as follows: 1. Where the question is one of a common or general interest, and *one* or more sue or defend for the benefit of the whole. 2. Where the parties form a voluntary association for public or private purposes, and those who sue or defend may fairly be presumed to

represent the rights and interests of the whole; and 3. Where the parties are very numerous, and though they have or may have separate and distinct interests, yet it is impracticable to bring them all before the court."

In view of these decisions it would seem there could be no question but that *one* taxpayer may maintain an action for the benefit of the whole. While it is true there were several joined as complainants, in those cases, yet the decisions are not based upon the fact that there was more than one. On the contrary, the court, in the Smith case, quotes with approval the following exemptions from the general rule: Story Eq. Pl. "1. Where the question is one of a common or general interest, and *one* or more sue or defend for the benefit of the whole."

The decisions in El Paso Water Co. v. El Paso 152 U. S. 157, and Colvin v. Jacksonville, 158 U. S. 456, cited by appellee are not in point, because neither of the complainants in those cases attempted to sue for the benefit of the other taxpayers and the decisions are based solely upon the fact that the interest of the single complainant did not equal the jurisdictional amount, and they could not, when suing alone, place in issue the entire issue of bonds stated.

(3) Appellee further contends that it is to the interest of appellant to prevent the construction of the water works, and this is the sole object of the suit, while the interest of the other taxpayers is to have the water works constructed and therefore the question does not involve a common interest, and appellant does not represent the interest of the other taxpayers.

It may be possible that it is to the interest of appellant to defeat the effort of the city to erect a competing water works plant, but there is nothing in the record, from which such conclusion can be drawn, except the fact that appellant was authorized, by its charter, to construct water works of its own. It does not follow, from that fact alone, or the fact that it owns a water works plant (if it be a fact) that the object of the suit is to prevent the construction of water works by the city.

The bill of complaint shows that appellant is one of the large taxpayers of the city and the *avowed* purpose of appellant is to protect its interests as a taxpayer, and that of all the other taxpayers. If it is to be assumed that appellant has some ulterior undisclosed motive, or another and separate interest not in common with that of the other taxpayers, it certainly cannot be well contended that it is thereby debarred of its rights that are in common with those of the other taxpayers and cannot maintain an action to protect this separate right, and for the benefit of others whose rights are in common, where the only thing *involved* is one of common interest.

The sole object of this action is to compel the city to carry out the contract made between it and the taxpayers, by preventing it from doing a thing which will deprive the taxpayers of their property without their consent.

If the final result of the litigation will be as appellee contends, such result cannot alter the legal status or rights of the parties in this action. The court will fail to find anything in the record indicating that appellant will not fairly represent the

interest involved in the action, and will not look outside the record for other interests or motives.

Counsel of appellee cite the opinion of this court in Smith vs. Swormstedt, (supra) as follows, as being in conflict with our contention:

> " In all cases where exceptions to the general rule are allowed, and a few are permitted to sue and defend on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried."

We respectfully submit that this language will not admit the interpretation contended for by appellee. There is nothing in the record in this case indicating that appellant will not fairly represent the interest or rights *involved in the action.* If it is to be assumed that part, or all the other taxpayers are so eager to obtain the erection of an additional water works plant, as to be willing to pay $244,000 instead of $200,000 as originally agreed, and that $220,000 shall be expended therefor, instead of $200,000 as originally stipulated, still that will not affect the question as to whether appellant will fairly prosecute this action to obtain the relief sought by the bill of complaint.

The most that could be said is, that appellant is probably too eager to enforce the legal rights of others, who have an interest

in common with it, when such others may possibly be willing to abandon their legal rights and submit to a deprivation of their property without due process of law.

A reversal is respectfully asked.

JOHN D. ATCHISON,
WILLIAM T. ELLIS,
Attorneys for Appellant.

LITTLE & SLACK,
Counsel.